LANK PAGE

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 732

INTERNATIONAL ASSOCIATION OF MACHINISTS; TOOL AND DIE MAKERS LODGE No. 35, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS; AND PRODUCTION LODGE No. 1200, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF THEREON.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

BLANK PAGE

INDEX.

Subject Index.

	Page
Petition	1
Statement of the case	2
Questions presented	7
Reasons for allowance of writ	7
Prayer	9
Brief in support of petition	11
Opinion of the court	11
Jurisdiction	11
Statement of the case	12
Specification of error	12
Argument	13
I. The employees engaging in organizational activities were not supervisory employees so as to make their actions attributable to the employer	13
II. Assuming the action of the employees was attributable to the employer, nevertheless, no activity of the employer can operate to destroy an otherwise admittedly appropriate craft unit	20
III. It is the duty of the Board at least to investigate verified claims of a change in choice of a representative made known to the Board prior to any previous certification. The Board erred in ignoring the claim and certifying a rival union representing only a small per cent of the employees as exclusive bargaining agent without holding an election	26
Conclusion	33

Cases Cited.

Consolidated Edison Co. v. *N. L. R. B.*, 59 Sup. Ct. 206	19

P

Hamilton-Brown Shoe Co. v. *N. L. R. B.*, 104 F. (2d) 49 8,
Jefferson Electric Co. v. *N. L. R. B.*, 102 F. (2d) 949..
In the Matter of Cudahy Packing Co. and *United Packinghouse Workers, etc.*, 13 N. L. R. B. 61.....
Texas & N. O. R. Co. v. *Ry. Clerks*, 281 U. S. 548....

STATUTE CITED.

National Labor Relations Act, 49 Stat., 29 U. S. C. A. 151 .....

TEXT CITED.

Third Annual Report, N. L. R. B..... 21,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS; TOOL AND DIE MAKERS LODGE No. 35, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS; AND PRODUCTION LODGE No. 1200, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of International Association of Machinists (hereinafter called I. A. M.), Tool and Die Makers Lodge No. 35, and Production Lodge No. 1200, affiliated with the International Association of Machinists, all unincorporated associations and labor organizations, by their attorneys,

Joseph A. Padway, and Herbert S. Thatcher, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause on November 20, 1939, affirming an order of the National Labor Relations Board dated July 27, 1938.

Statement of the Case.

This case arises from the refusal of the court below to set aside an order of the National Labor Relations Board, dated July 27, 1938, pursuant to a petition requesting review of such order filed in said court by petitioners herein. The order (see R. 667-702 at 698) from which review was sought and which was affirmed below required, among other things, that the Serrick Corporation of Muncie, Indiana, cease and desist from giving effect to a collective bargaining contract dated August 6, 1937, between petitioner, Tool and Die Makers Lodge No. 35, and the company, covering the tool and die makers employed by said Serrick Corporation at its Muncie, Indiana, plant, and requiring said Serrick Corporation to recognize the International Union, United Automobile Workers of America (hereinafter called U. A. W.), Local 1590, affiliated with the C. I. O., as exclusive representative of all the production workers employed by the Serrick Corporation at its Muncie, Indiana, plant, including the highly skilled tool and die makers there employed. Under said order and decision the Board (1) illegally invalidated a mutually advantageous collective bargaining contract, (2) arbitrarily and capriciously refused to prescribe as appropriate for purposes of collective bargaining a unit consisting of all such tool and die workers employed by the said Serrick Corporation at its Muncie plant, and (3) arbitrarily refused to investigate or take action on notice given to it by petitioners prior to its decision and order that the majority, to wit 90%, of the production

employees of the Serrick Corporation had become affiliated with the petitioner, Production Lodge No. 1200.

The petitioners are labor organizations affiliated with the American Federation of Labor and enrolled employees of the Serrick Corporation at its Muncie plant—skilled tool and die craft workers, into Tool and Die Makers Lodge No. 35, and unskilled production workers into Production Lodge No. 1200.

The respondent, National Labor Relations Board, is a Governmental agency organized under an Act of Congress known as the National Labor Relations Act, 49 Stat. 449.

The Serrick Corporation is engaged in the manufacture of bolts and screws, automobile mouldings, refrigerator parts and stenotype machines. It does a large interstate business and has an annual payroll of over a million dollars.

The Company, as other similar plants, maintains a tool room in which it employs some sixty-three tool and die makers, whose duty it is to make and repair the tools and dies used in the production department of the plant. These tool room workers are highly skilled and receive a compensation considerably in excess of that paid the production workers. Their trade, involving a long apprenticeship, has long been recognized as a well defined craft. The tool room is separated from the production department by a wire fence. (See R. 157, 237-9, 270, 276 & 635).

The present controversy arises over attempts by petitioners herein, and the U. A. W., a rival labor organization, to enroll employees in the production and tool room departments of the Serrick Corporation at Muncie, Indiana, in their respective organizations. During the early summer of 1937 the U. A. W. had been conducting a campaign of organization among production employees of the Serrick Corporation. On July 28 of that year the I. A. M. began to organize the tool room employees. After forming Tool

and Die Workers Lodge No. 35, and after having enrolled a majority of the tool room employees, it entered into a closed shop collective bargaining contract with said corporation on August 6, 1937. Subsequent to the making of said contract the I. A. M. started organizing the production workers into a separate local, Production Lodge No. 1200. This organization of production workers into a separate local was done in accordance with the constitution of the I. A. M. in force for many years, which provides for separate locals for non-skilled production employees who work on machines (R. 590-593).

Upon charges being filed by the U. A. W. with the National Labor Relations Board, a complaint was issued on October 5, 1937 against the Serrick Corporation, which, among other things, alleged that the corporation had discriminatorily discharged 18 tool room employees because of their membership in the U. A. W., although such discharges were pursuant to the closed shop contract; that it had refused to bargain with the U. A. W.; and that it had by various acts of coercion and interference attempted to discourage membership in the U. A. W. and encourage membership in the I. A. M.

Prior to the filing of this complaint the U. A. W. had filed a petition for certification under Section 9(c) of the Act in which it claimed to represent a majority in a unit consisting of the production workers, *exclusive of tool room employees.* On September 27th this petition was amended to include tool room employees in the unit. The petition and complaint were consolidated for the purpose of hearing, and the I. A. M. intervened in the joint cases on October 12th. A lengthy hearing, lasting from October 18th through November 18th, was conducted by a Trial Examiner appointed by the Board. All parties participated in this hearing. The Trial Examiner filed his Intermediate Report on March 4, 1938. He found, among other things, that the

Company had interfered with the organization of *production workers* by the U. A. W.; *that the closed shop contract covering the tool room employees with the I. A. M. was valid and binding, having been entered into at a time when the I. A. M. represented an uncoerced majority of tool room employees;* that the Company had not assisted the I. A. M. in reaching this majority; that tool room employees constituted an appropriate bargaining unit.

The U. A. W. filed exceptions to this report. On July 27th, 1938, the Board handed down its decision reversing the Trial Examiner and substantiating for the most part the exceptions filed by the U. A. W. In this decision the Board invalidated the I. A. M.'s closed shop contract. The Board concluded that the I. A. M. did not represent an uncoerced majority of employees in the tool room at the time of the execution of the contract, having been assisted by activities of certain tool room employees members of the I. A. M., whom the Board termed "supervisory" and whose actions were accordingly held attributable to the employer.

The Board further found that the tool room employees did not constitute an appropriate unit, but that the appropriate unit consisted of all production employees of the Serrick Corporation, including those employees employed in the tool room. The Board stated, however, that the only reason it did not designate the tool room as an appropriate unit consisting of craft workers as it customarily had done in previous cases, and did not give the employees an opportunity to indicate the type of representative, craft or industrial, they desired by voting thereon according to the Board "Globe Doctrine"[1] was because the tool room workers had been influenced in their choice by acts of so-called supervisory employees, and because the I. A. M.

[1] Matter of Globe Machine & Stamping Co., 3 N. L. R. B. 294, 3rd Annual Report, pages 167-174.

had organized the production and tool room employees at approximately the same time, thus making the division artificial. Chairman Madden dissented from this latter reason.

The Board, without holding an election, certified the U. A. W. as the exclusive bargaining agent for all the production and tool room employees of the Serrick Corporation. This was done in spite of the fact that prior to the issuance of the decision the I. A. M. had formally notified the Board that there had been a change in the employees' choice of a representative and that the I. A. M. now represented an overwhelming majority of the production workers as well as the majority in the tool room (See R. 12-17), and in spite of the fact that an election to determine this question was requested and in fact had been expected by all parties. The Board entirely disregarded such notice of change in affiliation and did not even attempt to investigate the matters referred to by the I. A. M. in its notice.

Petitioners sought a review of this decision in the Court below.

The decision of that Court sustained in its entirety the order of the Board. The Court further held that the Board was under no obligation or duty to investigate the claim of the I. A. M. that the majority of the employees in the production department had changed their affiliation and now desired to be represented by the I. A. M., and that its certification of the U. A. W. as exclusive bargaining agent of all employees of the Serrick Corporation was proper. Chief Justice Groner dissented from that portion of the decision affirming the order of the Board holding invalid the closed shop contract covering the tool room workers. He held that the employees who engaged in solicitation were not supervisory employees in any sense of the word, but were merely ordinary employees soliciting on behalf of the union to which they belonged.

Questions Presented.

The principal issues involved in this appeal are these:

(1) On the uncontradicted evidence did the Board err in holding that the employees who were alleged to have assisted the I. A. M. in organizing the tool room workers were "supervisory employees" and that their conduct as such was attributable to the employers, and in thereby invalidating the closed shop contract of the I. A. M.?

(2) May the Board as a punitive measure refuse to prescribe an otherwise admittedly appropriate craft unit for the sole reasons (a) that the employer had influenced the choice of the employees in that unit and (b) that the parent labor organization had attempted to organize production and tool room employees at the same time?

(3) May the Board arbitrarily refuse even to investigate the claim of the I. A. M. made prior to the decision that the majority of the production workers had designated the I. A. M. as their collective bargaining agent, and certify a bargaining agent then representing only 10% of the employees?

Reasons for Allowance of Writ.

The grounds relied on by the petitioners for the allowance of the writ are:

1. The decision of the Court of Appeals for the District of Columbia is contrary to the provisions of the National Labor Relations Act, particularly section 7, thereof,[2] guaranteeing employees the right to select their own type of representative.

---

[2] Sec. 7. Employees shall the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

2. The decision, insofar as it holds the Board did not err in refusing to investigate the claim of a change of affiliation made by the I. A. M. prior to the Board order, is in conflict with a decision on the same matter involving the identical issue decided by the U. S. Circuit Court for the 8th Circuit, entitled *Hamilton Brown Shoe Company* v. *N. L. R. B.*, 104 Fed. (2d) 49.

3. The decision, insofar as it involves a determination that certain employees were "supervisory employees" and their conduct attributable to the employer, is contrary to the undisputed facts and is contrary to a stipulation entered into by all parties.

4. The case involves in its essential features the question of whether the Board has the power to disrupt and destroy craft organizations and deny skilled employees choice of representation, by refusing to prescribe craft units because the employer has allegedly committed an unfair labor practice against employees in said unit, thus penalizing employees for the acts of the employer as a punitive measure against the employer. A decision on this question is of tremendous and vital importance to all craft labor organizations throughout the country for the reason that the decision of the Board provides an easy method for the employer to control representation by simulated preference, and for the Board to destroy the craft form of labor organization.

5. The case likewise involved in its essential features the question of whether the Board has the power to invalidate collective bargaining contracts beneficial to employees and conducive to industrial peace, because of organizational activities of older and experienced employees who have no actual supervisory powers, and who are members and officers of bona fide labor organizations. The status, under the Wagner Act, of thousands of such employees who are

members of a bona fide labor organization, and speak favorably in its behalf, is involved in a determination of this question.

Prayer.

Wherefore, the petitioners respectfully pray that writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify to and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, April Term, 1938, No. 7258, International Association of Machinists, Tool and Die Makers Lodge No. 35, et al., petitioners, vs. National Labor Relations Board, Respondents, and that the judgment and decree of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioners will ever pray.

International Association of Machinists, Tool and Die Makers Lodge No. 35, et al., Petitioners.

By JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners,
321 Tower Building,
Washington. D. C.

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS; TOOL AND DIE MAKERS LODGE No. 35, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS; AND PRODUCTION LODGE No. 1200, AFFILIATED WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court.

The opinion of the United States Courts of Appeals decided November 20, 1939 is printed in the record filed herein at R. 733.

Jurisdiction.

1. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended.

2. This case devolves upon an interpretation of the National Labor Relations Act. The action of the Board is alleged to be in violation of said Act.

3. The decision of the United States Court of Appeals is in direct conflict with a decision on the same matter decided by another Circuit Court of Appeals.

Statement of the Case.

The foregoing petition for writ of certiorari contains a concise statement of the case and in the interest of brevity such statement will not be repeated here.

Specification of Error.

1. The United States Court of Appeals for the District of Columbia erred in finding that certain employees engaging in organizational activities on behalf of a labor organization were supervisory employees so as to make their conduct attributable to the employer, and in finding the activities of such employees sufficient to authorize nullification of a collective bargain contract entered into by the petitioners and the Serrick Corporation.

2. The Court below erred in affirming the power of the Board to refuse to designate an otherwise admittedly appropriate bargaining craft unit, for the sole alleged reasons that the employer had engaged in unfair labor practices against employees in such unit and that the labor organization requesting the unit had organized the remainder of the employees into a separate local at approximately the same time.

3. The Court below erred in upholding the action of the Board, disregarding a verified claim to a change in choice of representative by employees acquired subsequent to the hearings but prior to the decision. The decision of the Court below in this respect is contrary to the decision of

the Circuit Court of Appeals for the 8th Circuit on the same matter.

ARGUMENT.

I.

THE EMPLOYEES ENGAGING IN ORGANIZATIONAL ACTIVITIES WERE NOT SUPERVISORY EMPLOYEES SO AS TO MAKE THEIR ACTIONS ATTRIBUTABLE TO THE EMPLOYER.

The Board's order invalidated a collective bargaining contract covering the tool room employees entered into between the Serrick Corporation and Tool & Die Makers Lodge No. 35. The contract contained clauses advantageous to both parties, and its terms were conducive to industrial peace. Among other things the contract stated that "during the life of this agreement no strike shall be caused or sanctioned by the union and no lockout shall be entered upon by the employer until every peaceful means of settlement of the difficulties have been tried" (R. 8-11). The Board's reason for nullifying this contract, as stated in its decision (R. 685), was that the I. A. M. had been assisted in obtaining the requisite majority "by a corps of supervisory employees." Although the activities of these so-called supervisory employees were in no sense coercive under the meaning of Section 8 (1) of the Act, but were merely the normal incident of an organizing campaign conducted by the members of two rival labor organizations solely on behalf of such organizations, we do not at the present time press that argument. We proceed to the question of whether the conduct of these employees was attributable to the employer. This question is principally one of law and does not entail examining the lengthy record.

The "corps" of so-called supervisory employees to which the Board refers in its decision as soliciting membership in the I. A. M. consisted of four employees—Fouts, Dininger,

Bolander and Shock (Pg. 14 of the Board's Decision, R. 680). Two other tool room employees, Byroad and Baker, were also alleged to have engaged in electioneering activities, but there is no attempt to classify these two as "supervisory employees" (Pg. 15 of the decision, R. 681). These four men were members and officers of Lodge 35, all being eligible to membership under the constitution of the union. None of these employees were in any sense "supercisory employees." None had been accorded any special powers of direction or control by the employer. They were merely what is known in the tool and die workers trade as "lead men." A lead man is a tool and die maker, who, by reason of long experience, or by previous experience on a particular job, has become skilled in the method of handling new jobs that come into the shop. He determines the best method of doing the job, which tools should be used, how the job is to be set up. A lead man is not looked up to as an actual "boss," even though at times they may be so termed when directing the setup of work. So, for that matter, would an apprentice or helper call an ordinary machinist his "boss." The lead men, after having set up the work, engage in tool and die making with the other tool and die workers, unless it is a very large shop in which case they are sometimes engaged in setup or "lead" work a greater part of the day.

The Board states that Fouts, alleged to be most active on behalf of the I. A. M., was "in charge of the roll department in the tool room and worked along side of certain machinists whom he directed". As explained, his duties consisted of setting up the work and in making "rolls" for the rolling department, on which latter job he was the sole worker (R. 386), and his direction ceased once the work was set up. He worked on the first shift where either McCoy or Dominick, foreman and assistant foreman respectively, were present a great majority of the time. (There is no

charge that McCoy or Dominick engaged in any electioneering activities.)

The four men against whom solicitation was charged were merely older and more experienced employees and were hired as workers and not supervisors. They had no power to hire or fire, and no duty even to make recommendations in this respect. Although it is stated that Fouts made recommendations, this was due to his seniority standing rather than to any official position he held, and such recommendations were no different from recommendations any other employee might care to make.

Further, the Board does not claim that Bolander and Shock did any soliciting but merely stated that they stood idly by while soliciting went on, or else, as in the case of Shock, to have been one of the first to propose organizing with the American Federation of Labor.

Bolander and Dininger were not "foremen". It is very misleading for the Board to call them "foremen" on the third and second shifts, respectively. The working hours of the plant were divided into three shifts; the first, the normal and principal shift, in which some 50 of the 63 tool room employees worked, the second, an evening shift in which eight or nine of the employees worked, and the third, an early morning shift, in which four or five worked. McCoy and Dominick had complete charge of these shifts, one being in charge when the other was not there (R. 306). They would appear at various times on all three shifts, whenever possible. On the last two shifts there were not enough tool room men working to require a foreman. Although Dininger and Bolander were lead men on the latter two shifts, neither Dininger nor Bolander had any higher classification, received any higher rate of pay, nor had any greater power than other employees, other than to set up work for them.

In addition to the foregoing considerations there are uncontested exhibits and a stipulation entered into by all the parties which conclusively indicate that these employees were not "supervisory employees". Respondent's exhibits Nos. 7 & 8 (R. 509-510) lists the working employees in the tool room and designate the supervisory employees. The only persons named as supervisory employees are McCoy, foreman, and Dominick, assistant foreman. These exhibits stand unrefuted.

Of greater significance, however, is the stipulation entered into by the unions, the Labor Board, and the employer, listing the ordinary working employees in the tool room (R. 483). This stipulation *expressly excludes* "foremen, office employees and *other supervisory employees*". The names of all four of the employees whom the Board now claims to be "supervisory employees" are expressly *included* in the list. The names of McCoy and Dominick are omitted. The Board's attorney signed the stipulation and the Trial Examiner found the stipulation binding. It was not until the Board's decision that any challenge was made to it. Chief Justice Groner emphasizes the significance and binding effect of this stipulation.

The Board claims that the solicitation by Fouts and others was done "pursuant to the known desires of the employer" and therefore states that these solicitations must be attributed to the employer. The Board does not claim that there was any actual direction or order of the employer to solicit on behalf of the A. F. L. There is no evidence that any solicitation was done pursuant to any known desires of the employer. The Board arrives at the finding necessary or prerequisite to being able to attribute conduct of these employees to the employer—to wit, the finding that the employer had made known his desires in the matter—by deducing this from the very act of solicitation itself, an excellent example of circular reasoning.

It is important to bear in mind that the above alleged soliciting employees were members and officers of Lodge No. 35. When officers and members of a union solicit membership for that union, at least the *prima facie* inference would seem to be that these activities are carried on on behalf of the union, not on behalf of the employer. However, the Board places the inference the other way, and without any other supporting evidence whatsoever other than the very fact of solicitation, finds that the employer desired the American Federation of Labor.

The decision does not rely on any actually coercive or intimidating remarks of these soliciting employees and does not claim that the I. A. M. was brought into the plant at the instance of any supervisory official of the company other than the four employees we have been discussing. *On the contrary it is clear from the record and the decision that the impetus to organization came from the employees themselves* (Pg. 13 of Decision, R. 678).

It would seem that the Board, by ignoring practical realities of organizational activities, has established principles which will go far to prevent realization of the ideal of amicable industrial relations achieved through collective bargaining with bona fide labor organizations. If the activities which took place in connection with the attempted organization in this plan by two rival labor organizations are to be outlawed as unfair practices, then in nine out of ten cases where rival national organizations are contending, countless incidents of the same general type here proscribed will be found which can be used as a basis for upsetting the stable relations resulting from collective bargaining contracts. It is inevitable that even minor supervisory employees who are eligible to and members in labor organizations will speak on behalf of their organizations. In such cases, is the Board to seize upon the slightest remark made by the most minor of supervisory employees as a reason

for destroying a contractual status that has been finally reached?

It can be argued that the Board's action in nullifying the contract was beyond its power even though the four employees in question were actually supervisory employees, for the reason that nothing that was said or done by these employees was coercive in the sense of overcoming or overriding free will. It is coercion of this type which the Act seeks to prevent, not mere acts of preference. See *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U. S. 548. As stated by the U. S. Court of Appeals for the Seventh Circuit, in *Jefferson Electric Company* v. *National Labor Relations Board,* 102 F. (2d) 949:

> "But while it is true that employer leadership through supervisory employees is condemned by the Act, and that pressure overriding the will of the employees, as a means of encouraging or discouraging membership in any labor organizations, constitutes interference with a worker's right to select his representative, it does not follow that the mere showing of a preference and acts of cooperation constitute interference with an employee in his exercise of the rights guaranteed under the Act."

As pointed out in the dissenting opinion of Chief Justice Groner, it is clear from a reading of the decision of the Board that it relies almost entirely on the admittedly antagonistic attitude of the Company toward the CIO during the spring and early summer enrollment drive of that organization, long prior to the time that the I. A. M. had made any attempt whatsoever to organize the plant and lack of similar active hostility to the I. A. M., to find employer assistance and coercion to join the I. A. M. To predicate a finding of company assistance to the I. A. M. upon a finding of prior interference with the CIO is an unwarranted procedure, denying a rival labor organization the right to

attempt organization in competition with a union which has been previously interfered with, and penalizing the union second on the scene for acts of the employer over which it had no control.

The remarks of this Court in the case of *Consolidated Edison Company* v. *N. L. R. B.*, 59 Sup. Ct. 206, are relevant to the present case. After commenting on the seriousness of upsetting collective bargaining contracts stabilizing industrial relationships, the court said:

> "Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10 (c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices, 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act might be effectuated by such an order.
>
> "The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violations where those consequences are of a kind to thwart the purposes of the Act.
>
> * * * * * * *
>
> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain

collectively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as to the result of that bargaining. *Nothing that the employers had done deprived them of that right.*" (Italics ours.)

II.

ASSUMING THE ACTION OF THE EMPLOYEES WAS ATTRIBUTABLE TO THE EMPLOYER, NEVERTHELESS, NO ACTIVITY OF THE EMPLOYER CAN OPERATE TO DESTROY AN OTHERWISE ADMITTEDLY APPROPRIATE CRAFT UNIT.

We come now to a proposition of gravest importance to craft organizations. Exercising nothing less than a punitive jurisdiction, the Board has laid down a principle which if permitted to stand may well afford both the Board (if it is so minded) and the employer, a method of effectively eliminating craft organizations from collective bargaining. In this case the Board has refused to designate highly skilled tool and die making employees as an appropriate unit for the purposes of collective bargaining solely for the following two reasons: (1) that the employer has assisted the I. A. M. in obtaining membership in the tool room, thus influencing the will of the employees; and (2) that the I. A. M. had organized both production and tool room employees at approximately the same time, although into separate locals (See page 23, Decision, R. 689).

Tool and die makers compose an historic craft. By reasons of skill, by reasons of specialization of abilities, by reason of the handicraftsman's pride in his work, tool and die workers have clung together in American industry as a group separate and apart from other mechanical

workers. They have received higher wages, have commanded respect and freedom in a plant, are looked up to as skilled technicians, and generally enjoy an advanced position in the field of labor. Their working quarters are usually separated from the rest of the production departments of the plant, either by being enclosed in a separate room or being set off by fences and gates, as in the present case (See R. 159, 235-237, 270, 276).

In designating a unit appropriate for collective bargaining the Board has customarily looked to factors such as these as indicating the appropriateness of my given unit. *In line with these factors, the Board, on all previous occasions in which it has been confronted with the present problem has classified the tool and die makers as a separate unit.* In its decision the Board admits:

> "* * * *While ordinarily* we have regarded as controlling the free choice of a majority of the employees *in a well-defined craft* as to the form of organization they desire, in the present case the respondent's conduct in influencing such choice precludes the application of this doctrine in the determination of the appropriate unit or units. * * *"

This is very important. It indicates that physical factors at least are sufficient to classify tool room employees into separate units to be bargained for by their own representatives.

Whenever two rival labor organizations attempt to enroll employees of a particular plant into their respective ranks and one labor organization is proceeding on a craft basis, the Board, in accordance with its established policy of looking to the actual desires of the employees as the greatest single controlling factor in designating a bargaining unit, will hold an election to let the workers indicate their wishes in the matter. This procedure is an application of what is known as the Globe Doctrine, (Pg. 168, Third Annual

Report, N. L. R. B.), and is in accordance with the dictates of Section 7 of the Act, giving employees the right to bargain collectively through representatives *"of their own choosing."* In the present case the Board denied the employees this right, contrary to Section 7 of the Act and contrary to its own Globe Doctrine. Instead it has ordered the tool room employees assimilated into the larger industrial unit.

The two reasons aforesaid are the sole reasons for its procedure in the present case. The Board in its brief and the Court below in the majority opinion attempted to add further reasons for the refusal to set apart the tool room employees, such as integration with the remainder of the plant and the fact that the I. A. M. majority was small. However, the Board in its decision, and it is only with its decision that we are concerned, places sole reliance on the reasons aforementioned. Let us examine briefly the validity of these reasons, and the consequence of upholding them.

First, as to reason number one, we may assume that the employer has influenced its employees in a particular unit to choose a craft representative as against an industrial representative. Is there any reason why this action should operate to destroy the appropriate unit? It may very well be that the employees cannot express their free choice and desire as to which type of representative—craft or industrial—they desire until after the employer has been ordered to cease and desist his practices and until after the effects of his activities have worn off. But should acts of the employer, over which neither the union nor the employees in the unit have any control, overcome all the circumstances and factors found by the Board to exist and to constitute an appropriate unit? Surely none of these circumstances are in the least changed or altered by the employer's activities. If, previous to the unfair practices, there existed a mutuality of interest by reason of skill, by reason of apprenticeship requirements, by reason of higher wages, by reason

of physical factors, these circumstances are still in existence after the unfair practices. Why should any act of coercion or discrimination on the part of the *employer* among employees in that unit operate to destroy it? The only proper concern of the Board in such cases is to see to it that the choice of the employees is exercised under fair conditions. In the present case the Board has gone to the extreme extent of penalizing not only the employer, but the union and the employees of the company who belong to that union, *and has permitted the employer's acts to destroy the unit,* and as a punitive measure turned over representation to a rival organization whom the employees may not want, to spite the employer.

This is all the more inexplicable when it is considered that *in all other cases* where unfair practices were found to have destroyed free choice, as in cases where illegal contracts have been entered into, or as in a case where an election has been won because of employer's activities, the Board has merely ordered the employer to cease such practices, and then has directed an election to be held in the future when the effects of the unfair activities shall have diminished. See 3rd Annual Report, page 143, Sec. c. In such cases it does not change the unit in which the contract was made or in which an election was held. Why is not that procedure followed in the present case? There is no difference in applicable principles. In both cases the Board is interested only in finding out what the employees want. And yet in the present case the Board has suddenly become interested only *in what the employer does not want,* and disregards both employees and the union in seeing to it that the employer does not get it, refusing the employees the right guaranteed them under Sec. 7 of the Act to choose their own representative. It is difficult to imagine a clearer case of punitive jurisdiction, condemned in the *Consolidated Edison* case. In that case it is expressly stated, and rightly

so, that nothing that *the employer* may do can deprive the employees of the right to choose their own representative for collective bargainng.

Further, it is very important to note that such a rule would afford the employer an easy method for destroying craft units by simulated assistance or preference.

The second reason advanced by the Board for refusing to designate the unit asked for by the petitioners is that the I. A. M. had chosen to organize both the tool room and the production departments at approximately the same time, thus making artificial the unit contended for, and estopping themselves from claiming separate units. It is to be noted that Chairman Madden refused to accept this reasoning, and dissented from that portion of the opinion.

In the first place it is not the fact that the I. A. M. attempted to organize both the tool room employees and the production employees at approximately the same time. Organization in the tool room had been completed and the closed shop contract entered into by August 6. It was not until August 10, by the Board's own findings, that the I. A. M. attempted to organize in the production department, and it was not until October 15 that the Production Local obtained a charter.

The Board argues that this division was artificial. Why it was artificial is not stated. For many years the I. A. M. has organized production and skilled workers into separate distinct lodges whenever the size of the plant or community warranted it. This practice is one prescribed in its constitution; it is one which it has customarily followed. See Art. A, Sec. 2 (R. 590-591, Art. A, Sec. 7 c, R. 592), and Section 6 of Art. B (R. 593), which states that in localities where there are sufficient numbers of machinists, die sinkers, tool and die makers, specialists, production workers or machine helpers employed in any one or more divisions of the trade, *separate local lodges* may be organized for the

benefit of these employees in their respective divisions. In practice the provisions of Sec. 6 have been construed to require separate local lodges wherever possible. This classification is no arbitrary act on the part of the I. A. M. Many unions are required to make such classifications, and generally they are accompanied by a difference in dues, duties and obligations. An unskilled worker in a machine shop, earning a moderate sum of money, may pay seventy cents a month as dues for membership in the production workers' union, whereas the highly skilled and higher paid craft worker may pay two dollars per month as dues for membership in his local union. The diversity of problems affecting the workers in the highly skilled crafts and the workers in the unskilled production end of the industry frequently brings about demands on the part of these workers for separate charters from the International Unions.

There are other considerations which we could dwell upon, but the foregoing will suffice to demonstrate the practical necessities which require this division.

However, regardless of its reasons, it is submitted that what the International Association of Machinists does in respect to its internal affairs, is entirely its own business. The National Labor Relations Act was not passed for the purpose of giving the Board a carte blanche to inquire into the internal workings of labor organizations and to probe their organizational policies with the end of agreeing or disagreeing therewith. Organized labor is extremely apprehensive over this policy of the Board, and it is of vital importance that the Court protect labor organizations from this outrageous interference with their internal affairs. When the National Labor Relations Act was passed organized labor was assured that there would be no such interference. On November 13th, 1935, Senator Wagner wrote a letter, which has since become a public document, to Daniel J. Tobin, General President of the International

Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, in which he gave this assurance to organized labor. We quote from this letter:

> "As author of the legislation I can say very definitely that it was never intended to permit the Labor Board to interfere in the internal affairs of labor organizations, and I do not believe there are any words in the Act conferring such power."

We therefore earnestly request this Honorable Court to grant this writ so that this problem of such momentous consequence to organized labor may receive the consideration of the Court.

Even worse is the Board's attempt to invoke an estoppel doctrine as against a bona fide labor organization. What relevancy to the establishment of a unit or units appropriate for collective bargaining purposes is there in the fact that the I. A. M. proceeded to organize in part on a craft and in part on an industrial basis in competition with another organization which was choosing to bargain entirely on an industrial basis? Does the fact of rivalry or competition make the craft unit any less or more appropriate?

III.

IT IS THE DUTY OF THE BOARD AT LEAST TO INVESTIGATE VERIFIED CLAIMS OF A CHANGE IN CHOICE OF A REPRESENTATIVE MADE KNOWN TO THE BOARD PRIOR TO ANY PREVIOUS CERTIFICATION. THE BOARD ERRED IN IGNORING THE CLAIM AND CERTIFYING A RIVAL UNION REPRESENTING ONLY A SMALL PER CENT OF THE EMPLOYEES AS EXCLUSIVE BARGAINING AGENT WITHOUT HOLDING AN ELECTION.

It is submitted that the Board has erred in ignoring the existing status of representation among employees of the

Serrick Corporation, in ordering the employer to bargain exclusively with an organization which no longer represents a majority, and in refusing to conduct an election as expected and requested. The present argument relates to and challenges Sections 1 (e) and 2 (g) (5) of the Board's order (R. 699-700).

The question raised is a practical one, particularly in view of the long period of time which customarily elapses between the filing of charges and the issuance of a decision in a contested case. Is the mere filing of charges under Section 10 of the National Labor Relations Act, and the issuing of a complaint thereunder, to be held to crystallize the employer-employee relationship as of the time of the alleged unfair labor practices? Are the employees to be forestalled from exercising their right of selecting a representative of their own choosing and prevented from changing their affiliation, even in the face of a considerable lapse of time?

The original petition for certification was filed August 16, 1937. During the hearings on the petition and charges it was stipulated that the U. A. W. had 471 signed application cards, and the I. A. M. 298, among production employees (R. 491). However, this stipulation was entered into for the purpose of avoiding any delay that would arise from checking and rechecking the cards, and it was stipulated only that the parties could present the cards that each claimed, not that the cards were genuine or would be determinative of the issue concerning representation. Both sides believed that the other had secured its membership improperly, and for that reason it was distinctly understood that an election would be held to settle the controversy respecting representation. It should be noted that the stipulation refers only to signed cards and does not state that either had a majority representation. The agreement before Circuit Judge Guthrie, of Muncie, Indiana, in which it was

stipulated by parties to the present case, in order to settle a strike over representation then pending, that the parties would abide by the result of an election to be conducted by the Board in the present case, seemed to them binding and they at all times expected an election to be held (R. 225, 312, 441).

The Board did not decide the case until July 27, 1938. During this period of almost a year both of the rival unions proceeded with organizational activities in anticipation of the election expected by all parties in accordance with the strike settlement stipulation before Circuit Judge Guthrie, until the I. A. M. obtained a 90% majority among production employees. This was accomplished several months prior to the time the Board decided the case and the employer was notified of the shift in membership from the U. A. W. to the I. A. M. Regardless of this notification, however, the U. A. W. had obtained a contract from the company recognizing it as exclusive bargaining agent. This was done on July 15, 1938. Immediately thereafter the I. A. M. issued a vigorous protest to the Board by telegram, and by verified statement and affidavit, in which C. F. McDonald, Grand Lodge Representative of I. A. M. set forth, under oath, the fact that a change in representation had occurred, that the I. A. M. represented a majority. Finally a lengthy letter to the same effect was written by Counsel of the I. A. M. to the Board. The Board was asked to investigate this claim and to take appropriate action thereon (R. 12-17).

The Board, however, refused even to investigate the claim of the I. A. M. It is submitted that the Board acted arbitrarily in certifying the U. A. W. as exclusive representative of all production employees on the face of the verified notification and strenuous protest made with it prior to its decision. The court below upheld the Board's action in this respect, stating as reasons, first, that any

shift in affiliation might have been occasioned by the employer's unfair practices in favor of the I. A. M. (although the employer entered into an exclusive contract with the U. A. W. thereby favoring that organization, not the I. A. M.) and second, that at the time of the hearing there was no doubt as to the majority and that subsequent "ex parte and self-serving assertions that a shift has occurred * * * would make a merry-go-round of the Act" since 'like representations could be made in turn following each new one by the contending unions in order to prevent or delay a decision contrary to their interests * * *." It should be noted, as before stated, that there was never an election in this case and all parties expected one and the stipulation called for one. (See R. 225, 312, 431 & 441).

This holding is directly opposed to a holding of the Eighth Circuit in the case of the *Hamilton Brown Shoe Company* v. *National Labor Relations Board,* 104 F. (2d) 49. In that case a situation identical to the present one existed. Subsequent to the hearing but prior to the decision, a change in representatives from the C. I. O. to the A. F. L. had occurred. The Board was notified of this change by letter and by petition. The Board ignored the notification and certified the C. I. O. union as the exclusive bargaining agent. The court held such conduct arbitrary and contrary to the letter and spirit of the Act. The court stated:

> "The Supreme Court, in Consolidated Edison Co. v. National Labor Relations Board, *supra,* held that the refusal of the Board to permit the employers to adduce certain additional testimony which could have been received without undue delay, was unreasonable and arbitrary. Having in mind that it is the fundamental policy of the Act to permit employees freely to choose their representatives, it follows that the employees have a right to change their choice, and when that fact has been brought sharply to the attention of the Board,

as in this case, it was, *we think, the duty of the Board to investigate the claim.* (Italics ours)

* * * * * * *

"So, in the instant case, the Board, after giving effect to its order to restore the *status quo* by reinstating the employees wrongfully discharged, and by disestablishing the company union, and requiring the employer to cease and desist from recognizing such union as a bargaining agency, should settle the question as to representation by requiring an election. We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act, to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it stands, it can not be assumed that the Union is now the accredited representation of the employees, but the showing made, and it stands without dispute, is at least sufficient to require investigation and to cause a court of equity to inquire whether an order requiring both the employer and the employees to recognize the Union as the bargaining agency should be enforced in the face of circumstances making such enforcement unwise, if not illegal. A court of equity will not do useless, unjust, or unequitable things. In re Hawkins Mortgage Co. (C. C. A. 7) 45 Fed. (2d) 937. Courts do not deal with abstractions. The proceedings here are substantially proceedings in equity in that equitable rules are applicable. National Labor Relations Board v. Cherry Cotton Mills (C. C. A. 5) 98 Fed. (2d) 4444. This court is granted power to modify orders of the Board. (Section 10(f))."

The decisions of the two circuits are in conflict. The factual situations cannot be differentiated. Which view is correct? It is submitted that the theory and the reasoning of the Eighth Circuit is more consonant to the spirit and purpose of the Act and more in accord with practical realities. In fact only recently the Board itself has conceded

the unreliability of certifications based on cards and has decided that the best policy is to hold an election. In the Matter of The Cudahy Packing Company and United Packinghouse Workers of America, Local No. 21, of the Packinghouse Workers Organizing Committee (CIO). Case No. R-1318, July 12, 1939, (13 N. L. R. B. No. 61), the Board said:

> "* * * We are thus faced with conflicting claims as to which of two labor organizations, each designated by a substantial number of the employees involved, is entitled, under the Act, to represent all of them. Our determination of representatives looks to the initiation of collective bargaining between the Company and its employees. We believe that since each of two contesting labor organizations has proved substantial adherence among the employees the bargaining relations which result will be more satisfactory from the beginning if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated. Although in the past we have certified representatives without an election upon a showing of the sort here made, we are persuaded by our experience that the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot. We shall accordingly, direct that such an election be held.
>
> "It should be noted that we are not here confronted with the necessity of deciding, upon the testimony and documentary evidence in the record, whether on the date of an alleged refusal to bargain, the Union represented a majority of the employees in the appropriate unit. * * * We are here concerned with establishing representatives for future bargaining purposes, and under the circumstances we think that such future bargaining will best be effectuated by holding an election by secret ballot."

The argument of the court below is that under the rule contended for interminable delay would result so that the

Act would become a "merry-go-round". A conclusive answer to this argument is that the Board need merely hold an election in cases such as the present one where it is informed under oath that there has been a change in choice of a representative. The holding of an election, by secret ballot, after ordering the employer to cease any unfair practices he might have engaged in, at such time the Board is satisfied that the effect of these practices has worn off, will conclusively settle the problem. It will be unnecessary to hold a number of successive hearings upon successive representations of changes of majority, as predicted by the court below. The Board, by proceeding upon an election basis rather than upon the basis of evidence of a majority introduced in hearing, can settle the question to the satisfaction of everyone. The Board's usual rule is that certification following an election will be binding for a period of one year, consequently it is impossible for any "merry-go-round" to result.

Assuming, however, that the Board does not wish to hold an election but wishes instead to proceed on the basis of evidence submitted to it at a hearing, is it not its duty when informed by verified statement of a change in representative after a lapse of a considerable period of time at least to *investigate* such claim, in the same manner that it investigates any other petition or charge filed with it before taking formal action thereunder? Certainly the making of such an investigation, which does not entail the reopening of the record or holding of additional hearings, would not result in making a "merry-go-round" of the Act. If on preliminary investigation the union is unable to produce satisfactory evidence in support of its claim, the claim can be ignored, and no one could accuse the Board of acting in a high-handed or arbitrary fashion. If, however, the investigation reveals that the claim is valid, certainly only disruption and chaos can result from disregarding the

changed circumstances. Certainly no possible policy of the Act is effectuated by ignoring the change, but on the contrary industrial strife would be fomented. In the present case, however, as in the *Hamilton-Brown* case, the Board made absolutely no attempt to make an investigation, preliminary or otherwise, but certified an organization in the face of a sworn statement that that organization represented only a small minority of the employees. Can it then be said that the Board acted in a reasonable manner? We submit that it has not.

The Act grants to employees full freedom of choosing representatives. This freedom includes the liberty to change representatives, a liberty which is denied to the employees of the Serrick Corporation.

Petitioners merely submit that the Board should not enter an order requiring the employer to deal with the U. A. W. All other provisions of the Board's decision and order, such as requiring the employer to cease and desist from its various practices, to reinstate discriminatorily discharged employees, etc., would still be valid; it can also be ordered that the employer cease and desist from refusing to bargain with the representative of the majority, to be designated in a proper Board election. If the Board does not wish to conduct any further hearings on the question of representation or to hold an election, then it cannot order the employer to deal with the U. A. W., in view of the facts brought to its attention. It is submitted that that portion of the Board's order (Sec. 1(e), Sec. 2(g) (5)) requiring the employer to deal exclusively with the U. A. W. is unlawful and contrary to the purposes and policies of the Act.

Conclusion.

It is submitted that the decree herein of the United States Court of Appeals for the District of Columbia is in

error and should be reversed, and it is respectfully urge that the court grant the writ of certiorari petitioners see herein.

Respectfully submitted,

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

Dated February 16, 1940, 321 Tower Building, Washington, D. C.

BLANK PAGE